UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JAMES L. ALEXANDER, appellant, v. DEPARTMENT OF COMMERCE, agency.	DOCKET NUMBER DC04328510399 Date: MAR 10 1986

BEFORE

Maria L. Johnson, Acting Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

Both appellant and the agency have petitioned for review of the initial decision, issued October 16, 1985, that sustained appellant's demotion for unacceptable performance. For the following reasons, the Board DENIES appellant's petition and DISMISSES the agency's petition as moot. 5 C.F.R. § 1201.115.

BACKGROUND

On June 9, 1985, the agency demoted appellant, an Employee Relations Specialist, GS-9, to Patent Copy Inspection Clerk, GS-4. The agency based its action on appellant's unacceptable performance in four critical elements of his position. Appellant petitioned the Board's Washington Regional Office for appeal of the agency's action.

The presiding official sustained the demotion, finding that the agency proved appellant's unacceptable performance in one critical element. The presiding official granted appellant's motion to dismiss the action with regard to the

other critical elements after finding that the performance standards for those critical elements were not sufficiently objective. She found, however, that the agency did not abuse its discretion in establishing the performance standard for critical element 2, and proved by substantial evidence that appellant failed to meet this performance standard. The presiding official also found that the agency acted under a performance appraisal system that had been approved by the Office of Personnel Management (OPM) and gave appellant a reasonable opportunity to improve before initiating the action. Finally, the presiding official rejected appellant's affirmative defenses of age and sex discrimination and reprisal for whistleblowing.

In his petition, appellant contends that the presiding official erred in finding that the performance appraisal system was approved by OPM, the performance standard for critical element 2 was proper, appellant was given a reasonable opportunity to improve, and the agency proved appellant's unacceptable performance in the critical element. Appellant does not contest the presiding official's findings on his affirmative defenses. The agency asserts that the presiding official erred in granting appellant's motion for summary judgment with respect to the other critical elements.

ANALYSIS

The agency demoted appellant under an OPM-approved performance appraisal system.

Appellant contends that the document submitted by the agency to show OPM approval of its performance appraisal system is insufficient because it approves only "changes" in the system. The document submitted by the agency is a letter from OPM, dated September 22, 1983. See Agency File, Tab W. As appellant points out, it states: "The changes which you have made in the Performance Appraisal System for the General

Workforce are approved as submitted." However, in a previous paragraph, it also states:

> This letter is in response to your July 26, 1983, letter in which you submit for OPM approval two Department of Commerce performance appraisal documents covering Senior Executive Service employees and general workforce employees.

Clearly, then, OPM was responding to the agency's request for approval of the entire performance appraisal plan. It would have informed the agency in the letter if the unchanged portions of the agency's performance appraisal plan were unacceptable. As the presiding official found, this is a case where appellant has not raised a serious question concerning OPM approval of the performance appraisal plan. See I.D. at 3-4; *Heller v. Department of the Air Force*, 28 M.S.P.R. 35, 37 (1985).

The agency did not abuse its discretion in establishing the performance standard for critical element 2.

Appellant contends that the performance standard for critical element 2 was not objective or reasonable. Critical element 2 required appellant to administer the leave regulations in the PTO [Patent and Trademark Office] with the objective of ensuring compliance with regulations and union contracts. The performance standard used for this critical element was the General Workforce Generic Performance Standards supplemented by the following:

> Outstanding: All oral and written responses on Leave Issues are technically correct, in accordance with all regulations, contracts and PTO policy. Response time results in no valid complaints. Policy guidance from supervisor is assimilated and transmitted effectively with no improper deviations.
>
> Satisfactory: No more than two valid problems are noted in: oral or written responses concerning regulations, union contract or policy; or complaints concerning slow response time; or failure to assimilate and/or transmit supervisory policy guidance.

Unsatisfactory: Four or more valid problems concerning any combination of the above. See Agency File, Tab V.

Appellant argues that the performance standard is not objective under the criteria established by the Court of Appeals for the Federal Circuit in *Wilson v. Department of Health and Human Services*, 770 F.2d 1048 (1985). We disagree. In *Wilson*, the court held that a performance standard should be sufficiently precise and specific as to invoke a general consensus as to its meaning and content, that is, that most people will understand what the performance standard means and what it requires. Id. at 1052, 1055. Applying this test, the court found that a performance standard providing that an employee "insure[s] adequate service to the public", assignments and instructions are "hastily made and sometimes misunderstood", and direction is "occasionally effective" was invalid. Id. at 1053-54. In contrast, it found a performance standard requiring that reports be completed in a timely manner, address all relevant issues, and require minimum revisions sufficiently objective and precise. Id. at 1055. The court also noted that the latter standard involved a professional position that was not susceptible to a judgment-free rating and that the agency had "fleshed out" the standard by instructing the employee, in an individual development plan, precisely how he could achieve a satisfactory rating. Id. at 1055-56.

We find that the performance standard for critical element 2 is sufficiently objective and precise under the *Wilson* criteria. Appellant argues that the term "valid problems" is undefined and could refer, for example, to a misplaced comma. However, most people would realize from reading the standard that the agency is referring to substantive problems of accuracy, timeliness, and gathering and transmitting information. Furthermore, appellant's position necessarily required the exercise of some subjective judgment by his evaluators. James C. Cooper, appellant's

supervisor, testified that appellant's duties were not clerical in nature; rather, they required the judicious use of thought processes and ability to make decisions; awareness of regulations, administrative orders, the federal personnel manual, statutes, administrative instructions and union contracts; and the ability to apply this guidance to various questions. Transcript, Volume 1 (Tr., Vol. 1) at 52.

In addition, the standard had been given content by memoranda detailing what was expected of appellant. In a Warning of Unsatisfactory Performance dated June 20, 1984, Mr. Cooper informed appellant that he was failing to process leave restoration, leave without pay, and advanced sick leave cases and to insure compliance with the regulations. See Agency File, Tab L. Mr. Cooper also counseled appellant about completing leave without pay actions on time and informing supervisors of their responsibility concerning leave without pay approvals. See Agency File, Tabs N and O. In addition, Mr. Cooper testified that he told appellant his actions must be timely and apply regulatory, contractual, and policy guidance. Tr., Vol. 1 at 49. We find that the performance standard, together with the content given it by Mr. Cooper, was sufficiently objective.

We also find that the performance standard was reasonable. Appellant argues that the standard was, in effect, absolute because it allowed for only two valid problems at the satisfactory level. Appellant's argument is without merit. The Board has interpreted an absolute performance standard to be one providing that one incident of poor performance will result in an unsatisfactory rating on a job element. See *Calloway v. Department of the Army*, 23 M.S.P.R. 592, 599 (1984). Appellant also contends that the performance standard is unreasonable compared to the previous performance standard for the position. However, the presiding official found that the current standard was attainable and, unless the supervisor gave it an unreasonable interpretation, probably more lenient than the old one. I.D.

at 2-3. Although appellant asserts that the performance standard required more than the previous standard, he has not supported his assertion with evidence. Mere disagreement with the presiding official's factual conclusions does not provide a basis for Board review. *Weaver v. Department of the Navy*, 2 MSPB 297 (1980).

In any event, an agency may properly decide to increase the quality and quantity of performance required of its employees, as long as it does so according to a reasonable standard. See *Walker v. Department of the Treasury*, 28 M.S.P.R. 227, 229 (1985). A performance standard is not invalidated simply because it could have been written more precisely. See *Roberson v. Department of Health and Human Services*, 29 M.S.P.R. 201, 203 (1985). Here, there is no showing that the presiding official erred in finding that the performance standard did not constitute an abuse of discretion.

The agency provided appellant with a reasonable opportunity to improve before proposing the action against him.

Appellant contends that he did not receive an adequate performance-improvement period. He asserts that work cited in the agency's proposal to remove[1/] him was taken away from him before the performance-improvement period began. Although the letter lists the cases that were removed from appellant before his performance-improvement period, it goes on to detail the projects appellant was given during the performance improvement period and to note that appellant's performance remained unacceptable. See Agency File, Tab K. As the presiding official found, appellant was given a letter of warning of unsatisfactory performance, a ninety-day period to demonstrate acceptable performance, and supervision and guidance during this time. I.D. at 4; see also Agency Exhibit

1/ Although the agency proposed to remove appellant, it decided to demote him instead.

#1. We find, therefore, that the agency provided appellant with a reasonable opportunity to improve. *Sandland v. General Services Administration*, 23 M.S.P.R. 583 (1984).

The agency proved appellant's unacceptable performance in critical element 2 by substantial evidence.

Appellant argues that the presiding official erred in sustaining the unacceptable performance charge against him. The presiding official found that the agency supported its specific allegations concerning appellant's unacceptable performance with Mr. Cooper's testimony and written documents. She concluded that appellant's assertion that he was overworked was not persuasive because he had been relieved of some of his duties. I.D. at 3.

In his petition for review, appellant repeats the explanation he gave to the agency's deciding official concerning the specific charges. See Agency File, Tab K. This does not meet the criteria for review, established by 5 C.F.R. § 1201.115, because it does not set forth specific objections to the initial decision. *Aistrup v. Department of Transportation*, 18 M.S.P.R. 299, 300 n.2 (1983). Appellant also contends that the presiding official did not make adequate findings concerning the specific instances of unacceptable performance. Our review of the record, however, supports the presiding official's conclusions. Mr. Cooper testified concerning the specific instances of unacceptable performance sustained under critical element 2. He identified ten instances of unacceptable performance by appellant that were relied on by the agency in taking the action and that occurred during appellant's performance improvement period. Tr., Vol. 1 at 61-68. Mr. Cooper also testified that he reduced appellant's workload by relieving him of responsibility for the suggestion program and for some telephone contacts. Id. at 72-73. Appellant testified that he was on leave when some assignments were made and that he received extensions in some instances. Even if appellant's

testimony is correct on this point, appellant has failed to rebut the agency's evidence of substantive problems with his performance. Tr., Vol. 2 at 13, 36-62. Because the agency has presented evidence of more than four valid problems with appellant's performance, we find that the presiding official did not err in sustaining appellant's demotion.2/

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. § 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

2/ Because of this decision, we find it unnecessary to address the arguments presented in the agency's cross-petition for review.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review, if the Court has jurisdiction, of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C